No. 18541

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. W. AGNEW,

Plaintiff and Appellant,

vs.

RICHARD W. MOODY, MACK E. RHODES, CHARLES B. RUSSELL, ELBERT E. STANFORD, B. C. ESTES, WILLIAM H. PARKER, RICHARD LASKIN, ROGER ARNEBERGH, PHILIP GREY, EDWARD L. DAVENPORT, ROBERT L. BURNS, WILLIAM B. BURGE, WILLIAM DORAN, NORMAN TULIN, HOWARD H. SCHMIDT, CHARLES HURD, CLARA CLAPP, G. VELLA CONSTRUCTION COMPANY, a corporation, DOMINIC GIANGREGORIO CONCRETE CONSTRUCTION COMPANY, a corporation,

Defendants and Appellees.

APPELLANT'S CLOSING BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES

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THE POSITION OF APPELLEES CONCERNING THE MATTER OF A SHORT AND PLAIN STATEMENT OF CLAIM.

Counsel for appellees spend some time in their briefs complaining for the first time on appeal that the amended complaint is not a short and plain statement of a claim. Appellees waived the point in the lower court by failure to assert it. The only grounds made by appellees in the lower court as a reason to dismiss the amended complaint was that it failed to state a claim upon which relief could be granted. It was Judge Westover who seized upon a

proposition that the amended complaint did not constitute a short and plain statement of a claim.

In Valle v. Stengel, 176 F. 2d 697, a civil rights case, the complaint had consisted of 26 counts, unusually long and prolix; among other matters therein was charged that Chief of Police Stengel had "aided and abetted" the private corporation defendant in denying the plaintiff his federally protected rights. The district court had dismissed the complaint, but on appeal the order of dismissal was reversed.

In United States v. Crown Zellerbach Corp., 141 F. Supp. 118, the Court stated at page 131:

> "...In so far as the complaint sets forth evidentiary matters, they are relevant to the controversy and provide a background for an understanding of the charges. ..."

And so it is in the amended complaint at bar that the matter is set forth to enable the court and the defendants to fully understand what is being charged.

In McCoy v. Providence Journal Co., 190 F. 2d 760, the complaint was argumentative, prolix, redundant and verbose, and had attached to it and labeled as exhibits lengthy letters and affidavits containing evidentiary matter including purported statements made by some defendants. The complaint was not so badly drawn that the defendants were prevented from making their defense. The matter

Court on appeal affirmed the judgment and concluded that any mere error of the complaint such as departure from the rule providing for short and plain statement of a claim would be treated as harmless.

None of the cases cited by appellees are in point which approve action such as the action of the lower court in throwing appellant out of court for his refusal to 'voluntarily' waive his claims against the other defendants by the act of further amending the complaint and complaining only against Moody and Rhodes. Even if it be held that the amended complaint was not a short and plain statement of a claim it still would have been the right of appellant to have further amended his amended complaint to cure any such defect and to assert his claim against all the defendants; but as to this right to further amend, if such course is thought was necessary, the lower court by its order dismissing all defendants other than Moody and Rhodes made it impossible for appellant to exercise the right.

THE POSITION OF APPELLEES ON THE QUESTIONS INVOLVED.

A. Question number 11 appearing on page 10 of appellant's opening brief has not been spoken of at all by appellees; they merely say that appellant should have 'obeyed' Judge Westover and filed a further amended complaint only as against Moody and Rhodes and leaving

out every claim against any other defendant. For the appellant to have done so would result in voluntarily, himself, waiving his just claims against the other defendants- something he did not have to do.

B. It is apparent from the briefs of appellees they do not squarely meet the issue raised here as to whether defendants could be held liable on a cause of action for "conspiracy". The very case they cite that of Kenney v. Fox, 232 F. 2d 288, holds on this point against them, and as well does McShane v. Moldovan, 172 F. 2d 1016; Valle v. Stengel, 176 F. 2d 697, hold a cause of action for conspiracy defeats a defense of immunity. cf. Burt v. City of New York, 156 F. 2d 791.

THE POSITION OF APPELLEES THAT ALL DEFENDANTS, EXCEPT MOODY AND RHODES, HAVE IMMUNITY FROM SUIT.

The brief of the County Counsel says (p.7):

> "The Amended Complaint could not have been amended further so as to rob these defendants of the immunity granted to them."

But, the objection of appellant is that none of the defendants had any immunity from suit for the corrupt and extraordinary wrongful acts committed against appellant.

The Civil Rights Act clearly spells out who are liable to suit for wrongful acts specified therein. The

Act says "every person" is liable. Following this clear statutory provision (Picking v. Pennsylvania R. Co., 151 F. 2d 240; Morgan v. Null, 117 F. Supp. 11; Sharp v. Lucky, 252 F. 2d 910; Ghadiali v. Deleware State Medical Society, 28 F. Supp. 841; Burt v. City of New York, 156 F. 2d 791; Cf. Ex parte Virginia, 100 U. S. 339, 346-348), the courts have, prior to Monroe v. Pape, 365 U. S. 167 and Baker v. Carr, 369 U. S. 186, attempted to dilute the legislative will by the judges spinning their own philosophy into the fabric of the law.

Baker v. Carr, supra, 369 U. S. 186, said:

> "...The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. ..."

Cf. Marshal v. Sawyer, 301 F. 2d 639.

Mr. Justice Douglas in his dissent in Tenney v. Brandhove, 341 U. S., stated at 382-383:

> "...But when a committee [of the legislature] perverts its powers, brings down on an individual the whole weight of government for an illegal or corrupt purpose, the reason for the immunity ends. ..."

Lord Coke expressed the proper thought when he informed King James that there was a law above the King.

To adopt the position of appellees as to their asserted immunity from suit would effectively bury the Civil Rights Act and thereby destroy the security of the citizens which the Act was adopted to preserve. To pronounce such an awful edict destroying that which was given birth for security and preservation of liberty is but to back-track a century when in Congress Mr. Porter of Virginia, who then was attempting to legislate liberty and security by passage of the Civil Rights Act, said: "The outrages committed upon loyal men there are under the forms of law". (Monroe v. Pape, supra, 365 U. S. 167 at 176). It is submitted that no public official shall be heard to say he is immune from suit as a tort feasor when he has committed an act which he had no lawful authority to do and of the extraordinary wrongful character shown in the amended complaint at bar. (Cf. Land v. Dollar, 330 U. S. 731, at 738).

The case of Peckham v. Scanlon, 241 F. 2d 761, cited by the County Counsel in his brief at page 13 is not in point here because in that case the defendant court reporter had merely failed to deliver a reporter's transcript after request had been made. In the case at bar, among other things, the defendant court reporter conspired to and did fraudulently prepare and have filed in court a fraudulent

reporter's transcript for purpose of fraudulently depriving appellant of his lawful liberty.

THE POSITION OF APPELLEES THAT THIS COURT CAN TAKE NOTICE OF MATTERS NOT OF RECORD.

The County Counsel at page 5 of his brief says:

> "The District Court was entitled to look to the records and files of the Los Angeles Municipal Court in considering the appellees motion to dismiss."

However, the mentioned 'records and files' were not before the District Court and that Court did not look to any such records or files and did not consider any such in deciding upon its orders. The only thing that the District Court looked at was, as Judge Westover stated:

> "THE COURT: Well, Mr. Agnew, I have gone over the complaint, the pleadings. I am going to dismiss the complaint....."

(Rep. Tr. 14, lines 17-19).

Counsel then continues in his brief at page 2 and invites this Court to "take judicial notice of the records and files of the Los Angeles Municipal Court action No. 760466 entitled People of the State of California v. R. W. Agnew. Said records are currently before the United States Supreme Court..."

counsel should have known, that such mentioned records and files are not now and have not been before the United States Supreme Court. Second, it is not made clear how this Court may take judicial notice of records and files of another court and between different parties especially when such records and files are not before this Court (except such as is shown by the Amended Complaint).

C O N C L U S I O N

It clearly appearing that appellant was refused his day in court and redress against appellees for the shocking wrongs they committed against appellant- acts which shock the conscience of mankind- and it appearing that the complaints of appellant are ones which the lower court should hear and decide on the merits after a full trial, and that justice and right command that course; it is respectfully submitted that the orders of the lower court, being in error, should be reversed.

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